Supreme Court, U.S.
FILED
94 643 OCT 5 1994

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ALEXANDER McLAREN,
Petitioner,

v.

KAY HARLAN,
Respondent.

Petition for a Writ of Certiorari to the Washington State Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

Alexander McLaren
Appellant, Pro Se
1953 South C St.
Tacoma, WA 98402
Tel: 206-383-4000

46 pp

QUESTIONS PRESENTED

Does a state trial judge's determination of the standard of care in a legal malpractice case based on his own intuitive knowledge without expert testimony constitute a denial of due process?

Can a state trial court find an attorney liable for malpractice under its own declared rule which requires an attorney to violate federal bankruptcy law and ethical rules to comply with the state rule?

Is a state rule which requires an attorney to violate federal law, preempted by federal law?

LIST OF PARTIES

Appellant is Alexander McLaren, a bankruptcy lawyer.

Respondent is Kay Harlan, a former bankruptcy client.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 8

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT BETWEEN THE SEVENTH CIRCUIT AND THE SUPREME COURT OF WASHINGTON STATE 8

A. The Seventh Circuit Court of Appeals Ruling 8

B. The Washington State Ruling In This Case 8

C. The Two Decisions Directly Conflict 9

D. This Case Is A Proper Vehicle For Resolving This Conflict 9

II. THE SUPREME COURT SHOULD GRANT THE WRIT BECAUSE A SUBSTANTIAL FEDERAL QUESTION WAS RAISED AT THE STATE LEVEL WHICH WILL AFFECT FEDERAL POLICY 10

A. Final Decree By The State Supreme Court 10

B. Substantial Federal Question Properly Raised At The State Level 10

C. There Exist No Independent, Adequate State Grounds 12

D. Significant Policies Are Dependent On This Decision 12

III. THE SUPREME COURT SHOULD GRANT THE WRIT BECAUSE THE TRIAL COURT'S ERRONEOUS RULING AS TO PROPER ATTORNEY BEHAVIOR IN A FEDERAL BANKRUPTCUY CASE SHOULD BE PRE-EMPTED BY FEDERAL LAW 14

A. Federal Common Law Requires That State Rules Which Unduly Impinge On The Execution Of Federal Statutes Be Preempted By Those Statutes 14

B. The Trial Court's Ruling Unduly Impinges On The Execution Of Federal Bankruptcy Law 14

C. This Issue Was Properly Preserved At The State Level 15

CONCLUSION 16

APPENDIX 1a

McLaren v. Harlan, No.61477-6, (Wash. St. Sup. Ct., July 6, 1994)(Order Denying Review) 1a

McLaren v. Harlan, No. 14039-0-II, (Wash. St. App. Ct., Jan. 28, 1994)(Order Denying Reconsideration) 2a

McLaren v. Harlan, No. 14039-0-II, (Wash. St. App. Ct., Dec. 15, 1993)(Decision) 3a

McLaren v. Harlan, No. 89-2-00646-0, (Wash. St. Superior Ct., May 29, 1990)(Decision: Findings of Fact & Conclusions of Law) 10a

Selected Statutes from Bankruptcy Code, Title 11 U.S. Code 16a

TABLE OF AUTHORITIES

CASES

Matter of Bayless, Bkrtcy S.D.Ohio, 78 B.R. 506 (1987) 5

Matter of Berryhill, Bkrtcy N.D.Ind, 127 B.R. 427 (1991) 7

Bonhiver v. Rotenburg, Schwartzman, Richards, 461 F.2d 925 (7th Cir. 1972)) 9

Brown v. National City Bank, 8 Ohio Misc.2d 40, 457 N.E.2d 957, 80 O.B.R. 583 (1983) 5

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) 13

Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902) 12

In re Mitchell, 66 Bkrtcy 73 (Bkrtcy S.D. 1986) 6

In re Modern Office Supply, Inc., Bkrtcy Okl., 28 B.R. 943 (1983) 5

Ogden v. Saunders, 12 Wheat. 213 (1827) 15

Sturges v. Crowninshield, 4 Wheat. 122 (1819) 14

In re Vallejo, Bkrtcy D.Puerto Rico, 77 B.R. 365 (1987) 7

Zucht v. King, 260 U.S. 174 (1922) 12

In re 312 West 91st Street Co., Inc., Bkrtcy S.D.N.Y., 35 B.R. 346 (1983) 6

U.S.CONSTITUTION

U.S. Constitution, Art.I, Sec.8, cl.4 14

STATUTES AND RULES

11 U.S.C. 362(a)(1),(3) and (d) 6

11 U.S.C. 521 5

11 U.S.C. 547(b) 7

11 U.S.C. 1101 et seq. 5

11 U.S.C. 1106(a)(2) 5

11 U.S.C. 1107 5

11 U.S.C. 1112(b) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No.___

Alexander McLaren,

Petitioner,

v.

Kay Harlan,

Respondent.

Petition for a Writ of Certiorari to the Washington State Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The order of the Supreme Court of the State of Washington, dated July 6, 1994, denying discretionary review is reproduced at page 1a of the Appendix to this Petition. The order of the Washington State Court of Appeals, Division II, dated January 28, 1994, denying reconsideration is reproduced at page 2a. The opinion of the Washington State Court of Appeals, Division II, dated December 15, 1993, is unpublished and is reproduced at pages 3a-9a of the Appendix. The decision (Findings of Fact and Conclusions of Law) of the Washington State Superior Court dated May 29, 1990, is reproduced at pages 10a-15a of the Appendix to this Petition.

JURISDICTION

The judgment of the Supreme Court of Washington State was entered on July 6, 1994. Pet. App. 1a. This Court has jurisdiction of this case on three separate grounds under 28 U.S.C. 1257(1), (2), and (3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves a lawyer's alleged mishandling of a client's bankruptcy. Accordingly, this case involves Title 11 U.S.C., the "Bankruptcy Code".

This case also involves a lawyer's alleged mishandling of a client's real property under foreclosure which the client sought to return to the mortgagee. Not realized by the trial

court, this matter is also governed by bankruptcy law because the matter occurred during the client's bankruptcy.

Although the state trial judge manifested a fundamental misunderstanding of the nature of bankruptcy purpose, practice and procedure as revealed in some of his findings, for obvious reasons the entire bankruptcy code cannot be cited and appended in this appeal. Accordingly, only selected sections have been included at the Appendix.

STATEMENT OF THE CASE

This is a legal malpractice case involving a state trial court's mistaken interpretation of a bankruptcy lawyer's duties under federal bankruptcy law. This case arose when the attorney, having been paid $1,500, sued to collect the remaining $4,000 owed.

Alexander McLaren is a bankruptcy attorney who has handled over a thousand bankruptcy cases. Harlan is an accountant. After considering other alternatives, Harlan retained McLaren to file a Chapter 11 bankrutpcy to stop a garnishment of her account.

From the very start Harlan was uncooperative in supplying information necessary to file her case. Once filed, McLaren's staff began to have difficulty obtaining monthly financial statements required to be filed. Harlan admitted during trial that McLaren and his staff asked her "100 times" for materials. Despite Harlan's continued lack of cooperation, McLaren prepared the reorganization plan and disclosure statement necessary to complete Harlan's Chapter 11 bankruptcy.

Eventually, Harlan's complete failure to prepare and file the last four months financial statements caused the bankruptcy court to dismiss her case. Harlan claimed that she was not able to prepare the last four months statements because her accountant quit. However, Harlan could have prepared the statements herself because she was an accountant.

During the entire course of her bankruptcy an "automatic stay" under bankruptcy law was in effect which stopped all garnishments of Harlan's account. Funds already garnished were not recoverable because the funds were not an "avoidable preference" because Harlan's bankruptcy estate was worth over $1 million, far more than the small debts giving rise to the garnishment. (See, this brief below.)

Harlan also asked McLaren to represent her in two other legal matters. In the first matter, Harlan was sued for breaching a commercial lease and the trial court determined McLaren obtained a satisfactory result. This matter is not part of this appeal.

In the second matter, which is part of this appeal, Harlan faced foreclosure of real property and asked McLaren to "take the steps necessary to turn the property back over to the bank". McLaren did so, but in the manner required under bankruptcy law.

Harlan ultimately became upset after learning the bankruptcy court was dismissing her case and she terminated McLaren from all matters.

After unsuccessfully attempting to collect or settle unpaid attorney fees, McLaren brought suit. Harlan denied the claim and counterclaimed for malpractice.

The case was tried before a state trial court. The court awarded judgment for McLaren on the commercial lease matter and judgment for Harlan on the remaining matters. The court made specific findings of malpractice and awarded Harlan damages which she had not pled, and rejected those she had pled.

The trial court's decision reflected its mistaken interpretation of a lawyer's duties under federal bankruptcy law:

(1) The trial court found Mclaren liable for failing to file a "limited" bankruptcy which the court perceived Harlan sought. The court's finding is squarely inconsistent with bankruptcy law which requires a debtor to file complete schedules. 11 USC 1107 (Debtor's Duties); 11 USC 521 requires completeness. Matter of Bayless, Bkrtcy S.D. Ohio, 78 B.R. 506 (1987).

(2) The trial court found McLaren liable for filing a "complete reorganization" for Harlan when the court perceived she wanted a Chapter 11 instead. This purported distinction clearly reveals that the trial court was utterly lost in the unfamiliar area of bankruptcy law. It is commonly understood that the two terms, "Chapter 11" and "reorganization", are merely different names for the same kind of bankruptcy. "Chapter 11" refers to the eleventh chapter of the bankruptcy code in which the "reorganization" form of bankruptcy is found. Heading of 11 USC Ch.11.

(3) The trial court found McLaren liable for requiring Harlan to file detailed business records. The court's finding is squarely inconsistent with Bankruptcy code sections 11 USC 1106(a)(2) and 521(1) which require the filing of complete, detailed records. 11 USC 1107; In re Modern Office Supply, Inc., Bkrtcy Okl., 28 B.R. 943 (1983); Brown

v. National City Bank, 8 Ohio Misc.2d 40, 457 N.E.2d 957, 80 O.B.R. 583 (1983).

(4) The trial court found McLaren liable for not resolving the garnishement of Harlan's account. The court's interpretation is clearly inconsistent with bankruptcy law. Although the trial court's meaning of the term "resolve" is not entirely clear, there are only two possible meanings. If the court intended the term to mean that McLaren should have stopped further garnishment of her account, it is clear that the trial court failed to understand a basic aspect of bankruptcy that an "automatic stay" automatically arose under 11 USC 362(a)(1) and (3) upon the filing of Harlan's bankruptcy which prevented all further garnishments of her account. In re Mitchell, 66 Bkrtcy 73 (Bkrtcy S.D. 1986). Alternatively, if the trial court meant that McLaren should have regained the garnished funds, the trial court failed to understand that the funds were not recoverable because they were not a "preference" under 11 USC 547(b). Although the preference rules are detailed, this essentially means that Harlan's bankruptcy estate, valued at $1 million dollars, was far more than her small debts.

(5) The trial court found McLaren liable for not converting or dismissing Harlan's case when it was apparent that it would not achieve her purpose. This finding clearly shows the court's fundamental misunderstanding of bankruptcy law because the Chapter 11 reorganization form of bankruptcy which Harlan was in would have achieved her purpose if she had not caused dismissal of her case by faililng to prepare and file monthly financial statements. 11 USC Ch.11, generally (purpose of Ch.11 bankruptcy); 11 USC 1112; In re 312 West 91st Street Co., Inc., Bkrtcy S.D.N.Y., 35 B.R. 346 (1983).

(6) The trial court found McLaren liable for failing to produce business records which caused the dismissal of Harlan's case. Under bankruptcy law the debtor herself had the duty to prepare and submit such records and failure to do so is typically grounds for dismissal. 11 USC 1112, Matter of Berryhill, Bkrtcy N.D. Ind, 127 B.R. 427 (1991); In re Vallejo, Bkrtcy D.Puerto Rico, 77 B.R. 365 (1987). (The debtor's lawyer, who does not run the debtor's business, is not in a position to prepare the debtor's monthly financial statements.)

(7) The trial court found McLaren liable for not resolving the debt which gave rise to the garnishment (discussed at 4 above). The trial court clearly misunderstood the fundamentals of Chapter 11 bankruptcy because the bankruptcy itself is the mechanism by which the debt would have been resolved if Harlan herself had not caused the dismissal of her case by failing to file her monthly financial statements. 11 USC 1100, et seq. generally. (See above).

(8) The trial court found McLaren liable for failing to dispose of Harlan's real property according to her literal instruction to "give the property back to the bank". The court's finding is squarely inconsistent with bankrutpcy law which does not allow bankruptcy property merely to be given back to a creditor. Property must be included in the bankruptcy and the creditor must move for relief from the automatic stay to regain the property. 11 USC 521, 547(b) and 362(d).

The trial court's findings were not only inconsistent with applicable law, but they were also unsupported by expert testimony. Harlan failed to call any expert to testify and the testimony of McLaren's experts did not support the findings of the trial court. There was no expert testimony whatsoever on any of the points 1 through 8 above (except that expert

testimony merely defined terms such as "reorganization" and "Chapter 11" contained in points 1 and 2 above.) Moreover, McLaren's experts testified that McLaren performed all of the required Chapter 11 bankruptcy duties.

McLaren appealed the trial court's decision on various grounds including that the duties and standard of care asserted by the trial court were squarely inconsistent with bankruptcy law and were not supported by expert testimony.

On appeal, the state appeals court declared that it could entirely dispose of the appeal solely on the issue of damages. It reversed all damages on the grounds that they were unpled and unavailable at law. (Thus, all of Harlan's claims of injuries and damages were either rejected at trial or reversed on appeal.)

On appeal McLaren also challenged the trial court's error's of law, but the appeals court declined to review them on the grounds that "unchallenged **facts** become verities on appeal". The appeals court's failure to review the errors of law arose because the trial court had failed to identify them separately but rather mixed them into its factual findings. Each mislabeled finding of fact actually concealed a conclusion of law or legal duty. (Using paragraph (3) above as an example, the trial court made a finding of **fact** that McLaren wrongly required Harlan to file detailed business records, but that fact also implies a **legal** duty that he should not have done so. Furthermore, the implied duty was squarely inconsistent with genuine bankruptcy duties.) McLaren challenged all the legal duties concealed in all of the mislabeled and mixed findings of the trial court. By failing to review the legal duties concealed in the trial court's mixed findings, the appeals court failed to perform its primary role of reviewing the law applied at trial.

Having reversed all damages, the appeals court let stand the hollow ruling of malpractice and declared Harlan to be the prevailing party, awarding her $25,000 in costs, fees and interest at trial and on appeal.

McLaren then sought discretionary review of the case by the State Supreme Court which declined to review. This petition to the U.S. Supreme Court followed.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT BETWEEN THE SEVENTH CIRCUIT AND THE SUPREME COURT OF WASHINGTON STATE.

A. The Seventh Circuit Court of Appeals Ruling.

In Bonhiver v. Rotenberg, Schwartzmann, Richards, 461 F.2d 925 (7th Cir. 1972), the court held that a party's due process rights were violated when a judge determined the standard of reasonable care based on personal experience rather than relying on the testimony of expert witnesses. The court reasoned that the absence of cross examination and other protections of the rules of evidence barred the judge from inventing his own standards.

B. The Washington State Ruling In This Case.

In the case at bar, the trial court made specific findings that the plaintiff had committed acts of negligence while performing his client's Chapter 11 bankruptcy. There was no expert testimony presented by the defendant to establish the standards of behavior required of a lawyer in a bankruptcy

proceeding. Rather, the court adopted its own notions of reasonable care in making its determinations.

In affirming the trial court, the appellate court adopted these findings of fact and the underlying conclusions of law which they implied. Although the appeals court ruled that the findings of fact became verities because they were not challenged on appeal, the appeals court reached no decision concerning the underlying conclusions of law which required expert testimony.

In denying review of the appellate court's decision, the State Supreme Court adopted the decision of the state appellate court which upheld the trial court's findings.

C. The Two Decisions Directly Conflict.

In upholding the trial court's refusal to rely on expert testimony, the State Supreme Court implicitly found that such actions did not violate the due process clause of the United States Constitution. If the State Supreme Court had found such a violation, it would have had to reverse the trial court.

Thus, the Seventh Circuit and the Washington State Supreme Court are in direct conflict as to the necessity of expert testimony in determining the standard of reasonable care.

D. This Case Is A Proper Vehicle For Resolving This Conflict.

Bankruptcy practice and procedure is an extremely complicated scheme of rules which diametrically differ from normal state collection laws. Indeed, bankruptcy laws provide a forum and rules for the orderly liquidation of a

debtor's estate pursuant to scrutinized plan wherein claims are prioritized in direct contrast to state law under which creditors race to the courthouse. Thus, it is not surprising that a state trial judge who is comfortable with state collection law would entirely misunderstand federal bankruptcy law which diametrically opposes state law.

As such, this case constitutes a perfect example of where a state judge, with no practical experience as a federal bankruptcy judge, should not be allowed to define the standards for a bankruptcy lawyer without expert testimony as a guide.

As the statement of the case shows, the judge made numerous errors of law in his attempt to interpret the provisions of the Bankrutpcy Code. It is precisely these circumstances which call for expert guidance. Trial judges should not be permitted to intrude there own private interpretations of bankruptcy law and their own standards of behavior under such laws without expert advice.

II. THE SUPREME COURT SHOULD GRANT THE WRIT BECAUSE A SUBSTANTIAL FEDERAL QUESTION WAS RAISED AT THE STATE LEVEL WHICH WILL AFFECT FEDERAL POLICY.

Certiorari is appropriate "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. Sec. 1257(a) (1988).

The history and circumstances of the case at bar meet all the requirements of Sec. 1257(a): (1) there exists a final decree from the Washington State Supreme Court, (2) a substantial federal question was properly raised at the state level, and (3) no independent, adequate state ground exists.

A. Final Decree By The State Supreme Court.

As the record indicates, the Washington State Supreme Court denied review of the appellate decision on July 6, 1994. This meets the requirement for a final judgement on this matter at the state level. This appeal is properly before this Court.

B. Substantial Federal Question Properly Raised At The State Level.

1) The federal question raised is substantial.

The trial judge misread several requirements of the Bankruptcy Code, Title 11 U.S.C. These requirements formed the basis of the finding of negligent malpractice. Federal questions have been found to be insubstantial when they are frivolous or when the question has been foreclosed by prior, contrary Supreme Court decisions. Zucht v. King, 260 U.S. 174 (1922), Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902).

Clearly, a claim that a judge misread the facial requirements of a federal statute is not frivolous. The instances of this are clearly laid out in the statement of the case above. Nor is there any U.S. Supreme Court law which upholds the trial court's reading of the Bankruptcy Code. Therefore, the federal question is substantial.

2) The Federal Question Was Properly Raised At The State Level.

In order to allow the state court the opportunity to define an independent, adequate state ground and to ensure an adequate record, the Court requires the federal question to be

raised at the state level. Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

In the instant case, the petitioner clearly pointed to several sections of the United States Code in his briefs at the appellate court level where the misapplication of federal law was considered. The petitioner also made repeated references to Chapter 11 proceedings in his petition for review. And, the trial court itself made several references to Chapter 11 in its findings of facts.

Thus, all levels of the state judiciary which reviewed this case knew of the federal subject matter. Both levels of the state appellate system were specifically directed to Chapter 11 and were put on notice of the federal nature of the issues in this case.

C. There Exist No Independent, Adequate State Grounds.

While the appellate court held that the findings of fact were settled verities on appeal because they went unchallenged, the appellate court failed to review the underlying conclusions of law which were challenged and were implicit in those findings of fact. The petitioner made those underlying conclusions of law the centerpiece of his appeal. Indeed, this entire malpractice case which involves alleged mishandling of a client's bankruptcy case hinges only on the interpretation of bankruptcy law alone. The petitioner specifically assigned error to the absence of expert testimony supporting the court's factual findings with implied legal conclusions and to the discrepancies between the trial court's mistaken notion of bankruptcy duties.

D. Significant Policies Are Dependent On This Decision.

If this ruling by the trial court is allowed to stand it creates a repugnant conflict which is direct and positive. Bankruptcy practitioners will be less assured of avoiding liability even when they follow the standards in the statute. Either they are potentially liable to clients if they follow bankruptcy laws, or liable to the courts and bar associations if they fail to follow the rules. The implication of the erroneous result in this case could adversely affect the practice of bankruptcy and act as a disincentive to practice in this field thereby depriving both consumers as well as lawyers.

While malpractice should not go unchallenged, it is important to the federal system of government that the federal laws are not unduly hampered in their execution by state tort decisions.

III. THE SUPREME COURT SHOULD GRANT THE WRIT BECAUSE THE TRIAL COURT'S ERRONEOUS RULING AS TO PROPER ATTORNEY BEHAVIOR IN A FEDERAL BANKRUPTCUY CASE SHOULD BE PREEMPTED BY FEDERAL LAW.

A. Federal Common Law Requires That State Rules Which Unduly Impinge On The Execution Of Federal Statutes Be Preempted By Those Statutes.

Art. I, Sec. 8, cl. 4 of the U.S. Constitution grants Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. It was early held that state laws which conflict with federal law in this area are suspended to the extent of conflict. Sturges v. Crowninshield

4 Wheat. 122, 1819; Ogden v. Saunders, 12 Wheat. 213, 1827. (State law is superseded where the conflict is direct and positive and state and federal rules cannot be reconciled or consistently stand together. Kelly v. Washington, 302 U.S. 1, 1937).

B. The Trial Court's Ruling Unduly Impinges on The Execution Of Federal Bankruptcy Law.

By holding that an attorney is liable for malpractice because he failed to perform acts for the client which violate the Bankruptcy Code, the trial court has placed attorneys in the impossible position of having to choose between federal bankruptcy and state tort law. If the attorney follows federal bankruptcy law requirements, the attorney faces state tort malpractice as in this case. If the attorney follows the guidelines set down by the trial judge to avoid malpractice claims, the attorney will be in violation of federal bankruptcy procedures.

The only logical solution, the solution which follows common law, is to preempt the state ruling by requiring attorneys to follow federal bankruptcy guidelines and preventing state tort claims based on following those guidelines. Where an attorney successfully navigates the requirements of federal bankruptcy rules, the attorney should not face liabilty for following those rules.

C. This Issue Was Properly Preserved At The State Level.

The petitioner raised the supremecy question at all levels of the state inquiry. At the trial level, his defense was that he had followed the rules and regulations of the bankruptcy court. At the appellate and Supreme Court levels, he put into

his briefs specific language pointing to the supremency of federal bankruptcy law.

CONCLUSION

For the aforementioned reasons, this petition for writ of certiorari should be granted. The state trial court wholly misapprehended federal bankruptcy law. The state trial judge's determination of the standard of care in this lawyer malpractice case based on his own intuitive knowledge without expert advice raises a substantial question of whether due process was accorded in this case. The trial court's misinterpretation of federal bankruptcy law constitutes a substantial federal question. As a reult of misapprehending the duties of a practitioner under federal bankruptcy law, the state trial court's decision creates a rule which would require an attorney to break federal law and ehtical norms, and raises the question of why the ruling should not be pre-empted.

Respectfully submitted this 2nd day of October, 1994.

Alexander McLaren
Appellant, Pro Se

1953 South C St.
Tacoma, WA 98402
Tel: 206-383-4000

APPENDIX

THE SUPREME COURT OF WASHINGTON

ALEXANDER McLAREN,

Petitioner,

v.

KAY HARLAN,

Respondent.

No. 61477-6

ORDER

C/A No. 14039-0-II

This matter came before Department I of the Court on its July 6, 1994, Motion Calendar for Review. Department I having considered the Petition and the files herein, and the five members of the Department having unanimously agreed;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of July, 1994.

CHIEF JUSTICE
/s/

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ALEXANDER G. MCLAREN,

Appellant,

No. 14039-0-II

v.

ORDER DENYING MOTION FOR RECONSIDERATION

KAY HARLAN,

Respondent.

THE COURT has considered the appellant's motion for reconsideration and has determined that it should be denied.
Accordingly, it is

SO ORDERED.

DATED this 28th day of January, 1994.

FOR THE COURT:

CHIEF JUSTICE
/s/

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ALEXANDER MCLAREN,

Appellant,

v.

KAY HARLAN,

Respondent.

No. 14039-0-II
UNPUBLISHED
OPINION

DECEMBER 15, 1993

PETRICH, J.[1] -- Alexander McLaren, a licensed attorney, sued Kay Harlan, a former client, in Pierce County District Court for additional costs and fees he claimed were due under a professional service agreement between them to process a bankruptcy for Harlan as well as additional legal fees and costs for other unrelated matters. Harlan denied that any fees or costs were due under the agreement, or otherwise; asked for the return of fees she already paid; and she couterclaimed for damages caused by McLaren's failure to exercise a reasonable degree of skill and care in the performance of his professional duties, and for damages for violation of the Consumer Protection Act. Because the prayer of the counterclaim exceeded the district court's jurisdictional limits, the matter was removed to Pierce County Superior Court. After a bench trial, the trial court denied McLaren any additional fees under the professional

[1] Judge John A. Petrich was a member of the Court of Appeals at the time oral argument was heard on this matter. He is now serving as a judge pro tempore of the court pursuant to CAR 21(c).

service agreement; awarded Harlan, as the prevailing party to the agreement, $8,500 in attorney fees plus costs for her defense of McLaren's claim; and awarded McLaren $1,000 as reasonable attorney fees for one of the additional legal matters Harlan entrusted to him. On Harlan's counterclaim, the trial court concluded that McLaren made negligent errors and omissions amounting to legal malpractice, but that he did not violate the Consumer Protection Act.

While the trial court did not find that Harlan suffered any economic damages from such malpractice, it did find that she was entitled to $15,000 in general damages for emotional distress and an additional $9,175 for loss of income resulting from the emotional distress. The court entered judgment in favor of Harlan for general damages for distress of $23,175 ($15,000 plus $9,175, minus $1,000 awarded to McLaren), and $8,500 for attorney fees plus costs. McLaren appeals. We affirm in part and reverse in part.

McLaren devotes a major portion of his appellate brief to what he percieves to be the trial court's errors in considering claims not pleaded of claims which Harlan waived; errors in determining legal malpractice in the absence of expert opinion evidence as to the appropriate standard of professional conduct; and errors in allowing inadmissalbe evidence.

However, the issues on appeal are considerably narrowed by McLaren's failure to assign error to the trial court's findings of fact. Unchallenged findings are verities on appeal. Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986). The dispositive issue on appeal is whether damages for emotional distress are available for the tort of legal malpractice. We conclude that legal malpractice in the handling of a civil matter, which

does not impair the client's substantial economic interests, does not, by itself, support an award for emotional distress. Accordingly, we reverse the award of damages for emotional distress, and for the loss of earnings flowing therefrom. Otherwise we affirm the trial court's judgement.

According to the trial court's unchallenged findings, Harlan, a successful business woman who sold accounting systems, found herself embroiled in a number of legal difficulties in the spring of 1987. Her immediate problem stemmed from a garnishment against her business bank account to collect on a $40,000 default judgement entered against her. She entered into a written agreement with McLaren, who specializes in bankruptcy matters, to initiate a Chapter 11 bankruptcy proceeding "as a tactic to resolve one $40,000 debt". The written agreement specified a fixed fee of $1,500, and provided that if a dispute arose under the agreement, the prevailing party would be entitled to reasonable attorney fees and costs.

McLaren's staff, in spite of the limited purpose of the bankruptcy proceeding, processed the matter as if a complete business reorganization was contemplated, thereby making demands on harlan to produce detailed business records. McLaren was unsuccessful in resolving the $40,000 debt; did little to resolve the garnishment proceedings; and when the original purpose was not accomplished, did not move to convert the proceeding to a business reorganization or to dismiss the proceeding. the bankruptcy court ultimately dismissed the proceeding on its own motion for McLaren's failure to produce the required business records.

Harlan entrusted two additional legal matters to McLaren that were not included in the professional service agreement. One involved defending Harlan in a foreclosure

action against her property in Ellensburg by a financial institution when the note became delinquent. Harlan instructed McLaren to arrange for a surrender of the property without penalty, however, McLaren failed to follow Harlan's instruction and a court foreclosure resulted. McLaren's failings in the bankruptcy proceeding and his omissions in the foreclosure proceeding caused Harlan to suffer emotional distress.

The other legal matter involved defending Harlan in an action brought by the lessor of commercial premises in which Harlan was a lessee. At issue was whether Harlan was justified in vacating the premises prior to the end of the term because of a claimed structural defect in the premises. The trial court concluded that McLaren negotiated a satisfactory resolution of this dispute and awarded him $1,000 in legal fees.

Not all of Harlan's emotional distress was attributed to McLaren's malpractice. During the course of these proceedings, Harlan became estranged from her husband. According to the trial court's findings, her estrangement, her legal problems, and the effect of the bankruptcy proceedings on her business,which she should have anticipated, were additional causes of her emotional distress. Under these stressful conditions, Harlan lost $36,698 in earned commissions, $9,175 being attributable to the emotional distress suffered as a consequence of McLaren's negligence.

This state has recognized emotional distress as an element of compensable damages in a variety of situations. They are allowed in the independent cause of action for negligent infliction of emotional distress, *Hunsley v. Giard*,

87 Wn.2d 424, 553 P.2d 1096 (1976),[2] and in the independent cause of action of intentional inflection of emotional distress (outrage), *Grimsby v. Samson*, 85 Wn.2d 52, 530 P.2d 291 (1975). They have been allowed when such damages result from wilful or intentional acts in violation of a clear mandate of public policy, *Cagle v. Burns and Roe Inc.*, 106 Wn.2d. 911, 726 P.2d 434 (1986), or as an element of damages for injuries caused by an intentional or wilful tort. *Nord v. Shoreline Sav. Ass'n.*, 116 Wn.2d 477, 805 P.2d 800 (1991) (fraud and breach of fiduciary duty which was assumed to be an intentional or wilful tort); *Cherberg v. Peoples Nat'l Bank.*, 88 Wn.2d 595, 564 P.2d 1137 (1977) (intentional interference with a business relationship); *Odom v. Williams*, 74 Wn.2d 714, 446 P.2d 335 (1968) (malicious prosecution); *Gurno v. La Conner*, 65 Wn. App. 218, 828 P.2d 49, *review denied*, 119 Wn.2d 1019 (1992) (false imprisonment); *Wilson v. Key Tronic Corp.*, 40 Wn. app. 802, 701 P.2d 518 (1985) (nuisance).

Harlan fails to cite any authority from this or other jurisdictions that allows emotional distress damages in a legal malpractice claim.[3] The majority rule in the majority of

---

[2] Neither Harlan's counter-claim nor the trial court's findings supports an independent cause of action for negligent infliction of emotional distress.

[3] We note that in California one can recover emotional distress damages for legal malpractice. However, these cases are distinguishable from the one before us. *See Holliday v. Jones*, 215 Cal. App. 3d 102, 264 Cal. Rptr. 448 (1989) (emotional distress damages awarded against an attorney whose conduct in a criminal proceeding resulted in a judgment of guilty and imprisonment of the client where the client was ultimately vindicated on a new trial granted because of the attorneys ineffectiveness of counsel in the initial criminal proceeding). The court drew a distinction between the nature of the interest affected by the attorney's negligent conduct, namely property rights as

jurisdictions that allow damages for emotional distress is that in the absence of fraud, intentional conduct, wilful breach, or physical contact, emotional injuries are not recoverable when they are a consequence of other damages caused by the attorney's negligence. Mallen and Smith, *Legal Malpractice*, Sec. 16.11, at 904-05 (3d. ed. 1989). This rule is consistent with the line of authority in this state which limits such damages to the consequences of an intentional or malicious tort. The trial court in this case did not find that McLaren's actions were malicious or ill-intended. On the contrary, the court characterized McLaren's conduct as amounting to "negligent errors and omissions which constituted malpractice." Furthermore, the trial court did not find that McLaren's malpractice caused Harlan to suffer any economic damages. We conclude, that McLaren's legal malpractice does not support an award of damages for emotional distress.

McLaren also assigns error to the trial court's award of attorney fees to Harlan as the prevailing party under the professional services agreement. However, his brief is devoid of any argument or authority in support of this assignment or error. We do not consider an assignment of error unsupported by authority or argument. *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 593 P.2d 156 (1979).

We reverse the judgment awarding Harlan $23,174

---

opposed to personal liberty, concluding that the loss of personal liberty justified an award of damages for emotional distress. *Tara Motors v. Jasper*, 226 Cal. App. 3d 640, 276 Cal. Rptr. 603 (1990) (emotional distress damages awarded for legal malpractice where substantial economic interests were invaded). In the case before us Harlan suffered no loss of personal liberty and no economic damage from McLaren's negligent acts.

($15,000 for emotional distress, plus $9,174 for lost earnings attributable to such distress, less $1,000 awarded to McLaren); and award Harlan additional fees on appeal as the prevailing party under the professional service agreement. Costs below and on appeal are awarded to Harlan.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/

We Concur:

/s/

/s/

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON
IN AN FOR THE COUNTY OF PIERCE

ALEXANDER G. McLAREN

NO.89-2-00646-0

Plaintiff,

vs.

FINDINGS OF FACT
AND CONCLUSIONS
OF LAW

KAY HARLAN,

Defendant.

FINDINGS OF FACT

1. The Plaintiff is an attorney. He publicly advertises knowledge and ability in many areas of law, but specializes in bankruptcies. he operates his practice by extensive utilization of interns and clerical and secretarial help, which is appropriate for that type of practice. He supervises his staff. Plaintiff is a resident of Pierce County, Washington.

2. Defendant is a successful businesswoman selling accounting systems under a franchise from a national firm known as Safeguard. Defendant is a resident of Pierce County, Washington.

3. By the spring of 1987, Defendant found herself embroiled in a number of legal difficulties. Her attorney of many years was seriously ill with a disease that soon claimed his life. The Defendant had become acquainted with the Plaintiff in the course of mutual civic activities. She

discussed her immediate legal problems with him, and hired him in May of 1987. Defendant did not hire Plaintiff on the basis of his public advertising.

4. Defendant's immediate legal problem stemmed from a $40,000 judgment which had been taken against her in Whatcom County. Her business bank account, including a line of credit, was the subject of a garnishment proceeding. This caused her serious problems in relation to the operation of her business. This was the immediate legal problem which caused her to retain the Plaintiff.

5. After discussion of various alternatives and allowing Defendant time to consult with her husband, the mutual decision was made to utilize a Chapter 11 Bankruptcy proceeding to stop the garnishment, before judgment was entered on her business account.

6. The parties entered into a Professional Services Agreement, dated May 22, 1987. By the terms of that Agreement, Plaintiff was hired to commence a Chapter 11 Bankruptcy, "as a tactic to resolve one $40,000 debt." For his services, a fixed fee of $1,500 was specified, which would provide to Defendant "nothing beyond a normal Chapter 11." The Agreement also provided that in the event of dispute under the contract, the prevailing party was entitled to reasonable attorney fees and costs.

7. After original consultation with defendant, Plaintiff turned the matter of the bankruptcy over to his non-lawyer staff. Billings to the Defendant for claimed fees over and above the agreed fixed fee, fail to differentiate between his time and that of his staff in many instances. The staff did not take into consideration the very limited purpose of the bankruptcy filing. The forms did not include a complete

listing or disclosure of all of the Defendant's creditors, claims, or business activities. They processed the file and made demands upon the Defendant for information, as if a complete business reorganization was the ultimate result. There is little backup documentation for many of the charges to Defendant's account, or why these charges were considered to be "beyond a normal Chapter 11."

8. Plaintiff did little to obtain a dismissal or resolution of the garnishment proceeding, to free up the bank account and line of credit for the Defendant. He was unsuccessful in "resolving the $40,000 debt." He did not move to have the bankruptcy dismissed or converted to a complete business reorganization with a listing of all creditors, when the original purpose was not accomplished. He did not consult with the Defendant about these strategic matters. The acts of the Plaintiff were a proximate cause of emotional distress to Defendant, objectively manifested by worry, loss of sleep, inability to concentrate on work, and loss of appetite.

9. Plaintiff's staff and the Bankruptcy Court continued to require processing of the bankruptcy proceeding well into 1988. Required monthly financial statement filings were not timely made. Some of these late filings were the fault of the Plaintiff, some of the Defendant. Defendant's husband was the accountant for the business. Defendant and her husband became estranged in August of 1987, and the husband refused to provide any accounting work beyond the end of the year. The bankruptcy was ultimately dismissed by the Court for failure to make required filings and satisfactory progress toward reorganization of Defendant's business.

10. Defendant also entrusted two other legal matters to the Plaintiff. Although they involved claims against the

Defendant, neither were included in the bankruptcy proceeding. No fee agreement was entered between Plaintiff and Defendant for his services on these additional matters.

11. Defendant was faced with foreclosure of some property in Ellensburg, Washington, by a financial institution. Defendant instructed the Plaintiff to arrange for surrender of the property, without penalty, to avoid the cost and inconvenience of legal proceedings, and to avoid any credit problems that a foreclosure might cause. Plaintiff took no action on these instructions. Court foreclosure resulted. This omission of the Plaintiff caused further emotional distress to Defendant, objectively manifested by worry, loss of sleep, ability to concentrate on work, and loss of appetite.

12. The other legal matter entrusted to Plaintiff by Defendant was a pending lawsuit. Defendant was also a defendant, resisting an alleged breach of commercial lease. The main issues in that suit were the structural soundness of the portion of a building leased by the Defendant, and whether she was justified in vacating the premises prior to the end of her leasehold. The case was set for mandatory arbitration. Plaintiff did little in the way of discovery or preparation on the building issue. Plaintiff fought the action on alleged technical deficiencies in the pleadings. Two arbitration dates were set over to allow the Plaintiff's counsel to correct the deficiencies. He did not do so. Neither attorney did much in the way of evidentiary preparation for arbitration on the main issues. Plaintiff and Plaintiff's attorney in the other suit negotiated a $6,000 settlement to be paid by Defendant to the other Plaintiff.

13. Being dissatisfied with the resolution of all three matters entrusted to the Plaintiff, Defendant dismissed Plaintiff as her attorney in the spring of 1988.

14. The Defendant's original legal problems, the effect of the bankruptcy on her business, which she should have anticipated, and the breakup of her marriage, were additional causes of Defendant's emotional distress.

15. Commissions from Defendant's business were 20% gross sales. From the time Plaintiff began his representation of Defendant, until the time of trial, Defendant showed losses in commissions of $36.698.00. Competitive and economic factors contributed to this reduction in sales. In addition Defendant sought public office during this period of time. The Court takes judicial notice of the impact of election campaign upon one's time, energies and productivity. The Court finds that 1/4 of this loss of income is attributable to the actions of the Plaintiff.

16. The relationship between Plaintiff and Defendant involved a private transaction, and did not involve deceptive and unfair activities having a capacity to deceive a substantial portion of the public.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the persons and subject matter of this action.

2. Plaintiff's claim for additional fees in the bankruptcy proceeding is denied. Plaintiff did nothing "beyond a normal Chapter 11 Bankruptcy."

3. Defendant is the prevailing party pursuant to the written Fee Agreement, and is entitled to reasonable attorney fees in the sum of $8,500.00, and costs in the sum of $271.50.

4. Plaintiff achieved a satisfactory result in the case involving the breach of commercial lease, and is entitled to judgment for $1,000, in addition to fees already paid by Defendant.

5. Plaintiff's activities did not constitute a violation of the Consumer Protection Act of the State of Washington, nor create a private claim under that act for damages or attorney fees.

6. Plaintiff's handling of the other legal affairs entrusted to him by the Defendant consisted of negligent errors and omissions, which constituted malpractice.

7. Defendant shall be awarded judgment against Plaintiff in the sum of $15,000 general damages for emotional distress, and $9,175.00 for loss of income.

DONE IN OPEN COURT this 29 day of May, 1990.

JUDGE THOMAS A. SWAYZE, JR.

Sec. 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities of-

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section if-

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization

Sec. 521 Debtor's duties

The debtor shall-

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate-

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and , if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such

forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relation to property of the estate, whether or not immunity is granted under section 344 of this title; and

(5) appear at the hearing required under section 524(d) of this title.

Sec. 547. Preferences

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made-

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if-

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Sec. 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

Sec. 1107. Right, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

Sec. 1112. Conversion or dismissal

* * *

(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including--

(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) inability to effectuate a plan;

(3) unreasonable delay by the debtor that is prejudicial to creditors;